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No. 04-6964

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONER'S REPLY BRIEF

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I. A FINDING OF A *PRIMA FACIE* CASE CANNOT AUTOMATICALLY TURN INTO A DETERMINATION ON THE MERITS OF UNLAWFUL DISCRIMINATION

Respondent relies on the premise that a *prima facie Batson* finding (*Batson v. Kentucky*, 476 U.S. 79 (1986)) could automatically turn into a finding of discrimination on the merits if the challenger stands silent and fails to articulate a reason for his challenge when asked. Thus, asserts Respondent, the *prima facie* finding requires proof by a preponderance of the evidence (a) because of the supposed risk that a *prima facie* finding will automatically turn into a merits finding, and (b) because a merits finding must be made by a preponderance of the evidence. (Respondent's Brief (RB) 24-26)

Respondent's premise is defective, because the supposed risk upon which it is based is non-existent. Respondent cannot identify a single case in the nineteen years since *Batson* where the challenger stood silent, or where an objection to a peremptory challenge was sustained by default because the challenger refused to articulate a reason for a peremptory challenge after a request to do so by the court.

When this case was before the Court last term, Petitioner repeatedly pointed out, both in his reply brief and at oral argument, that there was no such case where the challenger stood silent. A year later Respondent still has been unable to identify a single decision where the challenger gave no reason, or where the combination of a *prima facie* case plus the challenger's silence compelled a finding of discrimination.

That result is hardly surprising. No competent attorney would ignore a court's request for an explanation of a

disputed peremptory challenge. Indeed, such a refusal would itself help support an inference that the challenge was based on a constitutionally impermissible purpose.

Respondent relies heavily upon the last sentence of the *Batson* opinion for this argument, but it takes that sentence out of context and misinterprets it. The last sentence reads:

> If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.

Batson v. Kentucky, 476 U.S. at 100. From this single sentence, Respondent asserts that if the prosecutor remains silent, and fails to give a reason, then the prosecutor will automatically lose the *Batson* motion. As shown, this sentence does not mean what Respondent claims it means. A refusal by a prosecutor to provide a reason, upon the trial court's request, is simply unimaginable.

Thus, this sentence does not mean that the Court in *Batson* assumed that prosecutors would often, or ever, refuse to give any explanation for their actions. Rather, the import of this statement was simply to make clear that the purposes of the *prima facie Batson* finding were (i) to elicit an explanation for the challenge, and (ii) to ensure that the proffered explanation, when articulated, was "neutral."

II. THE CORRECT TEST FOR A *PRIMA FACIE* CASE IS WHETHER THE EVIDENCE WOULD PERMIT AN INFERENCE OF DISCRIMINATION, NOT CALIFORNIA'S REQUIREMENT THAT THE OBJECTOR MUST PROVE THAT THE EXISTENCE OF A DISCRIMINATORY MOTIVE WAS "MORE LIKELY THAN NOT"

There are two common types of a *prima facie* case. The first is established by a permissive inference. See, e.g., *Ulster County Court v. Allen*, 442 U.S. 140 (1979). The second is established by proof by a preponderance of the evidence (more likely than not), sufficient to establish a presumption, which will prevail, if not rebutted. Respondent asks this Court to adopt the latter type of *prima facie* case. Respondent's argument should be rejected (a) because it is contrary to the three-step test for analyzing a *Batson* motion which this Court established in *Hernandez v. New York*, 500 U.S. 352, 360 (1991) and *Purkett v. Elem*, 514 U.S. 765 (1995); (b) because it would unduly elevate the threshold for obtaining the reasons for challenges and thereby frustrate *Batson*'s goal of prohibiting peremptory challenges made for discriminatory reasons; and (c) because it would improperly impose a merits test before the objector has access to the most important evidence of possible discrimination, namely, the challenger's reason.

In *Hernandez* and in *Purkett v. Elem* this Court effectively explained that a *prima facie Batson* case is established by a permissive inference. This is because a *prima facie* finding under *Batson* merely shifts the burden of producing evidence, does not create a presumption, and does not shift the burden of persuasion. As the Court held in *Purkett v. Elem*, 514 U.S. at 768, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Under this

formula, the burden of proof at *Batson*'s *prima facie* stage is merely a permissive inference of discrimination.

In *Purkett v. Elem*, 514 U.S. 765 at 767-768 the Court reaffirmed that each of these three steps must be evaluated separately, and that merits-level proof is not required until the third step: "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."

Under this test, the objector does not need to "prov[e] purposeful discrimination" – meaning prove discrimination by a preponderance of the evidence – until the third step of *Batson* analysis, after he has heard the prosecutor's reasons.

Respondent does not explain why the *Hernandez* and *Purkett v. Elem* analysis does not control here.

III. THE CONSEQUENCE OF A *PRIMA FACIE* FINDING IS TO COMPEL THE CHALLENGER TO GIVE A REASON FOR ITS CHALLENGE; THE CHALLENGER SHOULD BE REQUIRED TO DO SO WHEN THE OBJECTOR IDENTIFIES EVIDENCE SUFFICIENT TO PERMIT AN INFERENCE OF DISCRIMINATION

A. The Challenger's Proffered Explanation Is Ordinarily the Critical Evidence Needed to Establish the Existence of Discrimination

The pivotal issue at step one of *Batson* analysis is whether the challenger will be required to state a reason for his challenge. That proffered reason – when articulated – is critical to any finding of unconstitutional discrimination. However, the state's proposed rule requiring the

objector, at step one, to prove the actual existence of discrimination, imposes that burden prematurely, because at that point the objecting party, unlike a Title VII or other civil plaintiff, does not have access to the key evidence of discrimination, namely, the challenger's proffered reason.

Respondent claims that an objector can prove discrimination more easily at the step one *prima facie* stage, before he hears the prosecutor's reasons, than he can at the step three merits stage, after he hears the prosecutor's reasons. (Respondent's Brief (RB) 27) Respondent claims that the absence of the prosecutor's reasons helps, not hurts, the objector, because, supposedly, the prosecutor's reasons would be damaging to the objector's *prima facie* case. (RB 27) This contention ignores reality.

As shown in Petitioner's Brief on the Merits (PBOM), pp. 18-20 and Appendix, we surveyed 84 *Batson* decisions reported in Westlaw from January 1, 2002 through March 1, 2004, which contain or refer to a finding of invidious discrimination. In almost all of these cases, that finding of discrimination turned on analysis of the challenger's stated reason. Respondent does not challenge this data.[1] These cases establish that a *Batson* challenge cannot

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[1] Respondent notes that in one-third (26 of 84) of the cases in the Appendix to the PBOM a challenge to only a single juror was involved. Respondent then argues: "If challenging one juror is enough to establish a *prima facie* case . . . then the *prima facie* requirement serves no function. . . . That result, however, effectively abolishes peremptory challenges. . . . " (RB 31) The argument is contrary to *Batson*. In *Batson*, the Court prohibited even a "single invidious discriminatory governmental act," and held it not necessary to prove "several must suffer discrimination before one could object." *Batson*, 476 U.S. at 95. Respondent admits elsewhere "the well-understood principle that a challenge to a single juror can violate equal protection. See *Batson*, 476 U.S. at 95." (RB 42)

identify and root out discrimination until and unless the objector obtains, and the trial court hears, the challenger's reason.

This is an even-handed procedure. If the challenger states a race-neutral reason, as will often be the case, and if the trial court finds him credible, then the *Batson* motion will be denied on the merits.

However, because discrimination cannot be detected unless the prosecutor's proffered reason is known, the goals of *Batson* will only be realized by broadly construing the opportunity for the trial court to hear that reason. That will be achieved by retaining the *prima facie* threshold at the federal "permissive inference" level. But, if the threshold is pushed upward to California's unduly high "more likely than not" level, the opportunities to hear the challenger's reason will be sharply reduced, and *Batson*'s goals will be thwarted.[2]

B. The State Offers No Persuasive Argument for Obstructing Access to the Critical Evidence of the Challenger's Reason for His Challenge

(1) Respondent claims that *Batson* inquiries should be disfavored, because supposedly they "delay" or "disrupt" the jury selection process. (RB 39) Respondent is mistaken. In the instant case, the denial of two *Batson* motions regarding three jurors took no more than seven

[2] There is still another problem when the challenger does not state his reason, namely, that the record is not fully developed for appeal. Without evidence of the challenger's reason, appellate review is made more difficult, because it is much harder to determine whether the trial court acted properly in rejecting a *Batson* motion.

transcript pages. (Jt. App. 5-11) Ruling on the merits of those motions would have taken only a few minutes more. Trial court litigation of *Batson* claims is invariably brief, occupying only a small portion of the voir dire process.[3] Argument on the *Batson* motion here occurred during a trial recess on the first day, and before voir dire resumed on the second day. There was no "delay" or "disruption" here.

It is better to spend a few extra minutes to learn the prosecutor's proffered reasons, and to ensure that discrimination does not happen, than to take six years, and thousands of hours of litigation, as occurred here, when initial inquiry was not made. The adage about "an ounce of prevention" comes to mind.[4]

[3] See, e.g., *Lancaster v. Adams*, 324 F.3d 423 (7th Cir. 2003); *Paschal v. Flagstar Bank*, FSB, 295 F.3d 565, 574 (6th Cir. 2002); *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Harris*, 820 So. 2d 471 (La. 2002); *State v. Marlowe*, 89 S.W. 2d 464 (Mo. 2002).

[4] Only one amicus curiae brief was submitted in support of Respondent, by the Criminal Justice Foundation (CJF) of Sacramento, California. Notably absent is any brief of amicus curiae from any other state. This confirms that California stands alone (i) in asserting that a preponderance of the evidence is needed to establish a *prima facie Batson* case, and (ii) in prohibiting comparative juror analysis. Further, the position of this one amicus is so at odds with the principles which underlie *Batson* that it should be disregarded. For example, (a) this amicus is largely unconcerned by racial discrimination in jury selection, because it believes that "a jury tainted by racially motivated peremptory challenges can still be impartial." (CJF brief, p. 12) (b) This amicus believes it is more important to insulate a prosecutor from potentially being "embarrass[ed]" by having his racial motives questioned, than it is to preserve the equal protection rights of the jurors and the litigants to be free from racial discrimination in jury selection. (*id.*, pp. 24-26)

(2) Respondent asserts that a permissive inference test would cause prosecutors to reveal their reasons more frequently than they do now (Petitioner agrees), but Respondent asserts that test would interfere with prosecutors' work-product privilege. (RB 9, 30) This argument is without merit. It is similar to arguments raised many years ago against *Batson* itself. See *Id.*, 476 U.S. at 98. Respondent cites no authority allowing any work-product privilege to trump the jurors' Sixth and Fourteenth Amendment equal protection rights not to be excluded from juries for racially-discriminatory reasons.

(3) The state claims that "Petitioner can prevail only if California's standard is constitutionally prohibited," and that it is not, because this Court has not directed the states how to "implement" the *Batson prima facie* test. (RB 22-23). The state argues therefrom that, under federalism, it may use any *prima facie* test it wishes. (RB 22-23) It effectively argues that this Court should allow a double standard to exist, with one standard based on *Batson* and the equal protection clause, and with the other standard based on California procedure. Such dual approach is not allowed.

First, *Hernandez v. New York* and *Purkett v. Elem* establish the three-step process for evaluating a *Batson* claim. These are cases which the Court reviewed for constitutional error, under the Fourteenth Amendment's equal protection clause. Under the Supremacy Clause, those procedures are binding on the states, including California.[5]

[5] Of course, states are free, under their own statutes or constitutions, to protect constitutional rights to an even greater extent than they are protected under the U.S. Constitution.

Second, the California Supreme Court did not itself take such an approach. It did not intend to create an independent or unique California test. Instead, that court intended to follow *Batson*. It believes that its prior standard of "'strong likelihood' has never set a higher standard than *Batson* permits," *People v. Johnson* (2003) 30 Cal.4th 1302, 1317 (Jt. App. 133), and that "the California standard is not less generous than the test the *Batson* court itself applies to establish a *prima facie* case." *People v. Johnson*, 30 Cal.4th at 1319 (Jt. App. 129).[6]

(4) Respondent repeatedly claims that "requiring a statement of reasons from the striking party invalidates California's peremptory challenge statute, which provides that 'no reason need be given for a peremptory challenge.' Cal. Civ. Proc. Code §226(b)." (RB 6, 19, 27, 43) Respondent then argues that a *prima facie* case must be proven by a preponderance of the evidence, because it should take at least that much evidence before a statute may be declared "unconstitutional as applied." (*id.*) Respondent is incorrect.

Respondent relies solely on California Code of Civil Procedure (CCP) §226(b), which states: "A challenge to an individual juror may be taken orally or may be in made in writing, but no reason need be given for a peremptory challenge, and the court shall exclude any juror challenged peremptorily." Respondent contends that the phrase "no reason need be given for a peremptory challenge" categorically bars disclosure of the purpose of a

[6] Indeed, elsewhere in its brief, Respondent admits, contrary to its position on this point, that the California court held that "the different phrasings by this Court and the California Supreme Court . . . did not establish different burdens. . . . " (RB 9)

peremptory challenge. Respondent is mistaken for several reasons.

(a) The portion of CCP §226(b) on which Respondent relies appears to be no more than a definition of a peremptory challenge, framed to distinguish it from a challenge for cause. The "no reason need be given" clause merely explains that in the exercise of a peremptory challenge, unlike a challenge for cause, there is no "need" for a justification.

(b) The interpretation of CCP §226(b) proposed by Respondent cannot be accurate, because it would be wholly inconsistent with California Code of Civil Procedure §231.5, which codifies *Batson*-type challenges, and which provides: "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar ground." Enforcement of CCP §231.5 would be seriously impaired if CCP §226(b) were construed to create a privilege from disclosing whether a party had acted for the purpose of violating §231.5. Respondent conspicuously fails to cite or discuss §231.5.

(c) Further, CCP §226(b), regardless of its meaning, cannot operate to alter for California litigants the *prima facie* case standard established by *Batson*. If California could impose a more onerous standard for establishing a *prima facie* case, constitutional claims that would be sustained and redressed under *Batson* in other states would in California be rejected for lack of a *prima facie* case. If CCP §226(b) had that effect, it would obstruct enforcement of *Batson* and would be preempted by federal

law. *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123, 138, 108 S.Ct. 2302 (1988).

(5) The state claims that Petitioner's test calls for a *prima facie* case whenever there is a "mere logical inference," or an "improbable but barely logical" inference, of discrimination, regardless of how weak or strong the inference is. (RB 23, 30, 34, 37) This misdescribes Petitioner's position, which is that a *prima facie* case exists only if the evidence would allow a judge to draw a reasonable inference that challenges were based on group bias. If the inference were no more than "barely logical," a judge would be unlikely to find a reasonable inference of a *prima facie* case.[7]

(6) Respondent claims that because the motion at the *prima facie Batson* stage is supposedly a "merits motion," not a discovery motion, a merits standard should be applied at the *prima facie* stage. (RB 29) Respondent is incorrect. Under *Hernandez* and *Purkett v. Elem* all an objector can win at the *prima facie* stage is the right to obtain discovery, namely, the challenger's claimed reason. The objector cannot prevail on the merits of his *Batson* motion until step three, when he tries to show that the

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[7] For example, every time the prosecutor challenges a black juror, there might be, as Respondent asserts, a "mere logical inference" of discrimination. (See RB 34) However, under the federal cases which interpret *Batson*, and under Petitioner's proposed test, that modicum of evidence would not be sufficient, by itself, to allow a permissive inference of a *Batson* violation to be found without more information. That could include, for example, the race of the defendant, or whether the case contained racial issues, or the racial makeup of the venire. For, the strength of the inference would be quite different if one black juror is challenged when many black jurors remain in the box, or in the venire, as opposed to when only one or two blacks are in the room.

claimed reason is not credible, or pretextual. Thus, a merits test is not applied at the discovery stage.

C. Title VII Standards Do Not Support the Decision of the Court below, Because a Title VII Plaintiff Is Not Required to Prove Intentional Discrimination to Establish a *Prima Facie* Case

The decision of the court below rests on the supposed premises (1) that the standard for a *prima facie* case under *Batson* is, and should be, identical to that for a *prima facie* case of employment discrimination under Title VII, and (2) that in order to establish a *prima facie* case under Title VII, as well as under *Batson*, the plaintiff must persuade the court to make a finding at the *prima facie* stage that intentional discrimination "more likely than not" actually occurred. These supposed premises are inaccurate. Title VII has never been understood to require an employment discrimination plaintiff to prove, as part of his *prima facie* case, that unlawful discrimination actually occurred.

Respondent relies heavily on the following sentence in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), which Respondent twice quotes in full. (RB 17, 34-35)

> *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

438 U.S. at 576. Respondent's brief italicizes the words "more likely than not," but simply ignores the earlier portion of this passage, which makes clear a plaintiff need

only show evidence "from which one *can* infer" discrimination.

In *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), the Court held that the four elements of a *prima facie* case under Title VII are:

> (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas does not require that to establish a *prima facie* case a plaintiff must not only prove these four elements, but also go further and convince the court to make an additional finding that those elements, or other evidence, demonstrate that discrimination had actually occurred. To the contrary, this Court made clear in *Patterson v. McLean Credit Union*, 491 U.S. 164, 216 (1989), that "[t]he plaintiff need *only* prove by a preponderance of the evidence [the four *McDonnell Douglas* elements.]" (emphasis added)

In literally thousands of applications of *McDonnell Douglas*, including actions under the Age Discrimination in Employment Act, the Americans With Disabilities Act, and section 504 of the Rehabilitation Act, the lower courts have universally understood that a *prima facie* case could be established by proving the four facts set out in *McDonnell Douglas*, or their equivalent, or by adducing any other evidence sufficient to *permit* an inference of discrimination. *McDonnell Douglas* has never been understood to

require at the *prima facie* stage a finding that the existence of discrimination was more likely than not.[8]

Respondent's assertion that a Title VII *prima facie* case requires a finding of discrimination on the merits is also inconsistent with this Court's decisions in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Both cases addressed the proper disposition of a case in which the plaintiff had established a *prima facie* case, and the defendant had proffered an explanation which the trier of fact rejected as untruthful. If, *arguendo*, a *prima facie* case necessarily rested on a (preliminary) finding of intentional discrimination, the proffer of an untruthful explanation would do nothing to undermine that finding, and judgment would necessarily have to be entered for the plaintiff. Both *Reeves* and *Hicks*, however, held otherwise.

> The fact finder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination. But the Court of Appeals' holding that rejection of the defendant's proffered reasons

[8] The dissent at the California Supreme Court recognized the defect in the majority's reasoning, *People v. Johnson*, 30 Cal.4th at 1336 (Jt. App. 164) (Kennard, J. dissenting):

> To establish a prima facie case in the first stage, a title VII plaintiff is not required to show it is more likely than not that the defendant engaged in illegal discrimination. Instead, the title VII plaintiff is required to prove *facts* from which one can *infer* illegal discrimination.

> *compels* judgement for the plaintiff . . . ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

St. Mary's Honor Center, 509 U.S. at 511 (emphasis in original). This reasoning would make no sense if, at the *prima facie* case stage, the plaintiff had already been required to prove that intentional discrimination had occurred.

The standard proposed by Respondent is avowedly a stringent one, requiring a "persuasive showing" (RB 38) or proof of a "strong likelihood" of discrimination. (RB 2, 8, 11-12) Such a demanding requirement is clearly inconsistent with this Court's repeated admonition that under Title VII the burden of proving a *prima facie* case "is not an onerous one." *Patterson v. McLean Credit Union*, *supra*, 491 U.S. at 216; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 249, 254 (1981); cf. *Price Waterhouse v. Hopkins*, 490 U.S. 220, 270 (1989) (O' Connor, J., concurring) ("The *prima facie* case established [in *McDonnell Douglas*] was not difficult to prove.")

Finally, and surprisingly, the California Supreme Court's interpretation of Title VII law here is not only contrary to this Court's rulings, but is also inconsistent with that court's very own decision in an employment discrimination case only four years earlier. In *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, 100 Cal.Rptr.2d 352, 8 P.3d 1089, that court expressly adopted the standards utilized by this Court in employment cases. The California court then described (and adopted) the federal *prima facie* case standard which requires only evidence that would *permit* an inference of discrimination.

> [T]he plaintiff[] . . . must at least show "'actions taken by the employer from which one *can* infer,

> if such actions remain unexplained, that it is more likely than not that such actions were "based on a [prohibited] discriminatory criterion. . . ."'" [citation omitted] . . . quoting *Furnco Construction Corp v. Waters*, 438 U.S. 567, 576 (1978).

24 Cal.4th at 355 (emphasis added). That is a far different standard than the decision below here, which requires the court to go further at the *prima facie* stage and actually conclude that discrimination occurred.

IV. THE LOWER COURTS' RELIANCE UPON CONJECTURAL JUSTIFICATIONS AT THE *PRIMA FACIE* STAGE VIOLATES THE RULE THAT A *PRIMA FACIE* CASE IS TO BE EVALUATED WITH THE CHALLENGES "UNEXPLAINED"

The Question Presented is: "Whether to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?"

This standard is correct insofar as it insists that the sufficiency of a *prima facie* case should be resolved "unexplained," i.e., without regard to any explanations, whether actual or postulated, of the disputed challenges. (Petitioner contends, of course, this standard is incorrect in requiring proof that a peremptory challenge was "more likely than not" motivated by a discriminatory purpose.)

In determining if Petitioner established a *prima facie* case, the courts below attached great – indeed, dispositive – significance to whether those courts themselves could identify a possible legitimate explanation for the disputed challenges. The trial judge found there was no *prima facie*

case because that judge believed that particular statements by the jurors "would have justified a peremptory challenge." (Jt. App. 9) The state supreme court held that affirmance was required, whenever "the record suggests grounds on which the prosecutor *might* reasonably have challenged the jurors." *People v. Johnson*, 30 Cal.4th at 1325. (Jt. App. 147) (emphasis added)

The state defends that reasoning on the theory that at the *prima facie* case stage a trial judge may decline to be "persuaded by a showing offset by other information before them." (RB 3-4, n. 2) In so arguing, the state implicitly attacks the standard in the Question Presented which provides that, at the *prima facie* stage, challenges are to be assessed "unexplained."

The state's argument, relying upon judicially hypothesized reasons, confuses step one and step three of the *Batson* analysis. Under *Batson*, the point at which the court decides if the objector's evidence is "offset by other information," such as articulated reasons, is step three. In determining at step one whether the objector has established a *prima facie* case, the question is narrower – whether the objector's own evidence is sufficient to require disclosure of the claimed reason.

At step one of *Batson* analysis, the *prima facie* stage, if the challenger actually states his reasons, the question of whether there is a *prima facie* case becomes moot, and the court proceeds to determine whether the asserted reason is race-neutral (step two), and whether the reason is valid and credible (step three). *Hernandez v. New York*, *supra*, 500 U.S. at 359 (plurality opinion), citing *United States Postal Service Board v. Aikins*, 460 U.S. 711, 715, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983) (a Title VII case). Because stated reasons have no place at the *prima facie*

stage, and actually move a case beyond the *prima facie* stage, postulated or speculative reasons are similarly inapplicable, (a) because they are merely a proxy for stated reasons, and (b) because they are a legally insufficient proxy.

At step one the court considers the sufficiency of the objector's showing "if unexplained," because the very purpose of determining if there is a *prima facie* case is to decide whether to require an explanation. It makes no sense, and is directly contrary to *Hernandez v. New York*, for a court to find that there is no *prima facie* case, and excuse the challenger from giving a reason, merely because the court anticipates that the challenger might be able to articulate a race-neutral explanation if he were asked to do so.

It makes even less sense, and is similarly contrary to *Hernandez*, to reject a *prima facie* case because the court itself is able to articulate an explanation of its own for the disputed peremptory. It is irrelevant whether the trial judge, if he or she had been counsel for a party, might have peremptorily challenged a juror. It is equally irrelevant whether that challenge can be "explained" on paper, in the sense that the record provides a rational basis for objecting to the juror in question. If that challenge was in fact the result of a racially-discriminatory motive, it violated the constitution, regardless of whether someone else could identify, after the fact, an arguably race-neutral reason, or regardless of whether the state's actions, on paper, might satisfy a rational basis test.[9] The possibility that certain

[9] See, e.g., *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) ("[S]peculation does not aid our inquiry into the reasons the prosecutor actually harbored for the [disputed] strike. *Batson* is concerned with uncovering purposeful discrimination, . . . our review is focused solely

(Continued on following page)

facts about a juror *could* logically have supported a non-discriminatory challenge cannot establish that those facts were *actually* relied upon by the challenger, or that race-neutral reasons were actually employed.

The state suggests that this error is outside the scope of the Question Presented. (RB 49 n. 12). But the Question framed by the Court expressly proposes that proof of a *prima facie* case be based on the probativeness of the evidence "if unexplained." The Question Presented is not, as the state suggests, limited to the degree of persuasiveness of the objector's evidence; it also encompasses the question about whether or not a particular type of evidence – proposed explanations – should be considered at all at step one. We contend that the exclusion of speculative explanations is a correct one, and that it should preclude at step one any consideration of theoretical explanations hypothesized by the court or appellate counsel.

V. A *PRIMA FACIE* CASE OF A *BATSON* VIOLATION IS SHOWN ON THIS RECORD

Respondent does not deny that a *prima facie* case would be found here if the standard proposed by Petitioner were employed. Specifically, Respondent does not deny that a trier of fact could reasonably have inferred the existence of discrimination from the facts in this case. Respondent does not disagree that the statistical odds were 1:87 here that the prosecutor would challenge all

upon the reasons given"); *Bui v. Haley*, 321 F.3d 1304, 1313-1314 (11th Cir. 2003) (reasons given at post-trial hearing why assistant prosecutor would have challenged jurors fail to satisfy *Batson*, because no showing that chief prosecutor actually relied upon those reasons).

three black jurors (or any other three specific jurors). Respondent does not explain why these facts do not establish a *prima facie* case.

CONCLUSION

Petitioner respectfully requests that this Court reverse the court below and find that a *prima facie* case exists here.

Respectfully submitted,

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